UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PHILIP ROEDER, et al.,

Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY and BP AMERICA, INC.,

Defendants.

3:11-cv-105-RCJ-WGC

ORDER

Currently before the Court is Plaintiffs' motion for reconsideration (#53) of an order this Court issued on August 30, 2011. Specifically, Plaintiffs have moved for reconsideration of the Court's denial of leave to amend Plaintiffs' unjust enrichment allegations. For the following reasons, Plaintiffs' motion for reconsideration is denied.

BACKGROUND

Plaintiffs are landowners and residents in Yerington, Nevada who had their property damaged by, and/or who are at an increased risk of being personally injured by, toxic chemicals Defendants have permitted to escape from their property (the "Mine Site") into the surrounding air, soil, and groundwater. (Am. Compl. (#4) at 3-6). The Mine Site consists of an abandoned copper mine and extraction facility in Lyon County, Nevada. (*Id.* at 7). Empire Nevada Mining & Smelting Co. first opened the Mine Site as the Empire Nevada Mine in 1918. (*Id.*). Anaconda Co. acquired the Mine Site in 1952 and operated it until 1977, when Defendant Atlantic Richfield Co. ("ARCO") acquired Anaconda and operated the Mine Site until 1982. (*Id.*). These companies extracted approximately 360 million tons of ore and debris from the open pit mine, much of which now remains as waste in a "pit lake" and "tailings or leach

heap piles." (*Id.*). The toxic substances on the Mine Site—including arsenic, chromium, lead, mercury, uranium, thorium, and radium—have contaminated the local groundwater, surface water, soil, and air, leaving Plaintiffs exposed to them. (*Id.* at 7-11).

Plaintiffs sued Defendants in this Court. The amended complaint listed ten causes of action: (1) Nuisance; (2) Nuisance Per Se; (3) Strict Liability; (4) Trespass; (5) Battery; (6) Negligence; (7) Negligence Per Se; (8) Unjust Enrichment; (9) Fraudulent Concealment; and (10) Negligent Misrepresentation. (*Id.* at 19-41). Defendants moved to dismiss all claims except those for nuisance, trespass, and negligence. (Mot. to Dismiss (#28) at 2). By order dated August 30, 2011 (the "Order"), this Court dismissed without leave to amend all the challenged claims except those for strict liability and battery. (Order (#50) at 16).

On September 19, 2011, Plaintiffs moved for reconsideration of the Court's denial of leave to amend Plaintiffs' unjust enrichment claim, or alternatively to include a theory of unjust enrichment as a remedy. (Mot. for Reconsideration (#53) at 2). This Court had previously dismissed the claim stating that Plaintiffs failed to allege they bestowed any benefit upon Defendants. (Order (#50) at 13). Because Plaintiffs did "not allege ever to have permitted or acquiesced in the 'storage' of anything directly on their own land with the expectation of payment," the Court held that a claim for unjust enrichment did not lie here. (*Id.* at 14). The Court accordingly dismissed Plaintiffs' claim for unjust enrichment without leave to amend. (*Id.* at 16).

LEGAL STANDARD

Although motions for reconsideration are not specifically mentioned by name in the Federal Rules of Civil Procedure, they are generally allowed to be brought under Rule 59(e). *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). A court may grant a motion for reconsideration where the movant: (1) demonstrates that the Court committed clear error or that the initial decision was manifestly unjust; (2) presents newly discovered evidence; or (3) demonstrates that there has been an intervening change in controlling law. *Sch. Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Reconsideration of a previous order is an "extraordinary remedy, to be used sparingly in the interests of finality

and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quoting 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 59.30[4] (3d ed. 2000)).

DISCUSSION

Plaintiffs do not rely on newly discovered evidence or any change in the controlling law to support their motion for reconsideration, but rather rely solely on the argument that the Court committed clear error in its Order dismissing Plaintiffs' claim for unjust enrichment without leave to amend. Although the Court should freely give leave to amend, granting leave to amend is not necessary when there is "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also* FED. R. CIV. P. 15(a). As Plaintiffs have failed to demonstrate that the Court committed clear error in dismissing the claim for unjust enrichment without leave to amend because amendment would be futile, Plaintiffs' motion for reconsideration is denied.

Under Nevada law, "the terms 'restitution' and 'unjust enrichment' are the modern counterparts of the doctrine of quasi-contract." *Scaffidi v. United Nissan*, 425 F.Supp.2d 1159, 1170 (D. Nev. 2005) (quoting *Unionamerica Mortg. & Equity Trust v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981)). The concept of a quasi-contract is an equitable principal under which the court implies a contract where a contract should have been formed, but for some reason was not, to prevent the "unjust retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Asphalt Products Corp. v. All Star Ready Mix, Inc.*, 898 P.2d 699, 701 (Nev.1995) (quoting *Topaz Mutual Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992)). It is because unjust enrichment is a quasi-contract theory which implies a contract where one was contemplated, but not actually formed, that "an action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev.1997).

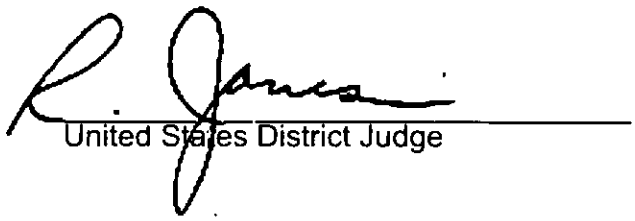
In this case there are no allegations that Plaintiffs or Defendants ever attempted to form a contract to dispose of the waste or even contemplated the formation of a contract. Plaintiffs

have only alleged that Defendants placed the waste on their property without permission. Although this may give rise to a claim of trespass, nuisance, or even strict liability for the harm to Plaintiffs' property, because no contract was ever contemplated by either party the action does not give rise to a claim of unjust enrichment. Accordingly, the Court did not err in dismissing Plaintiffs' claim for unjust enrichment and denying Plaintiffs leave to amend because Plaintiffs do not now claim they can allege any contemplation of a contract, and therefore allowing the amendment would be futile.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Plaintiffs' motion for reconsideration (#53) is denied.

DATED: This 11th day of May, 2012.



United States District Judge